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...ME COURT, U. S.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-303.

DAVID and MARY KINEE, et al.,
Petitioners,

v.

ABRAHAM LINCOLN FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondents deal at great length with the merits of the action. The issues before this Court deal only with procedure, the Court of Appeals never having gotten to the merits.

With respect to the issues before this Court, defendants refer to *United States v. Boccuto*, 274 F. 2d 860 (3rd Cir. 1959). It is submitted that the application of the holding in *Boccuto* to the case at bar pose a grave injustice for the reasons stated in the petition for writ of certiorari. Furthermore, *Boccuto* is not applicable. In *Boccuto*, the Internal Revenue Service was investigating Thomas and Delilah Boccuto and Boccuto Motor Freight, Inc. Certain information sought for inspection had been turned over by the Boccutos' accountant to their attorney, Tomaselli, who refused to turn over the documents to the special agent of the IRS. Pursuant to 26 U. S. C. §§ 7602, 7064, a Summons was issued, and an enforcement proceeding commenced in the District Court to compel compliance. An enforcement proceeding under these sections of the Internal Revenue Code is commenced by a complaint, not against the taxpayer under investigation, but against the person in custody of the records sought.

> "Because § 7604(a) contains no provisions specifying the procedure to be followed in invoking the Court's jurisdiction, the Federal Rules of Civil Procedure apply, *Martin v. Chandis Securities Co.*, 128 F. 2d 731. The proceedings are instituted by filing a complaint, followed by answer and hearing." *United States v. Powell*, 379 U. S. 48, 58, n. 18 (1964).

A so-called "petition" for enforcement will be treated as a complaint by the court. *Martin v. Chandis Securities Co.*, 128 F. 2d 731, 734 (9th Cir. 1942); *Wild v. United States*, 362 F. 2d 206, 209 (9th Cir. 1966). The action

should properly be captioned with the name of the person against whom the summons was issued. See e.g., *United States v. Mothe*, 303 F. Supp. 1366 (E. D. La. 1969).

Thus, neither the Boccutos nor Boccuto Motor Freight, Inc. were parties in *United States v. Boccuto, supra*, the caption notwithstanding. The District Court noted this:

> "It should be borne in mind, first, that while the United States attorney, for his own reasons, has entitled the petition herein in the name of the taxpayers, they actually are not, as yet, parties to the cause . . . ." 175 F. Supp. 886, 888 (D. N. J. 1959).

The Boccutos were never parties to the proceeding and could not appeal. A person not a party may not appeal. *First Iowa Hydro Electric Coop. v. Iowa-Illinois Gas and E. Co.*, 245 F. 2d 630 (8th Cir. 1957). This Court was therefore without jurisdiction over the attempted appeal in *Boccuto*. Notwithstanding, any language in this Court's opinion in *Boccuto*, that case has no application to the appeal at bar, where counsel is not a party and only the plaintiffs-appellants could possibly have appealed.

Defendants further claim that attorneys have standing to appeal on their own behalf in appropriate cases and cite in support *Angoff v. Goldfein*, 270 F. 2d 185 (1st Cir. 1959) and *Preston v. United States*, 284 F. 2d 514 (9th Cir. 1960). In both of those cases, the issue involved was the propriety of an award to counsel of attorneys' fees. In both cases, counsel was actually a party and had rendered itself so by petitioning the court on its own behalf for an award of counsel fees. That such action by petitioning counsel had made them parties is clearly indicated by the Third Circuit opinion in *Lindy Bros. Builders, Inc. of Phila. v. America R & S San. Corp.*, 487 F. 2d 161 (3rd Cir. 1973), wherein the Court of Appeals noted that

defendants in appealing an award of counsel fees to plaintiffs' counsel *probably* ought to have named the attorneys and not the original plaintiffs as parties on appeal. Nonetheless, the court went on to determine the case on the merits.

Respectfully submitted,

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